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No. 93-1794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNION TANK CAR COMPANY,

Petitioner,

v.

VARIOUS PLAINTIFFS IN CLASS,

Respondents.

(In re: Miamisburg Train Derailment Litigation)

Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the majority decision of the Ohio Supreme Court erroneous and in direct conflict with the Court's decision in *CSX Transp. Corp. v. Easterwood* (1993), 507 U.S. ____, 113 S.Ct. 1732, 123 L.Ed.2d 387, regarding federal preemption pursuant to § 434 of the Federal Railroad Safety Act, in refusing preemptive effect to the Secretary of Transportation's explicit and controlling regulation, 49 C.F.R. § 179.1(c), and specifically, in erroneously holding that:

1) the Secretary's regulation requiring brake pads after 1971 would "cover the same subject matter" of Plaintiffs' claims, while at the same time inconsistently holding that the regulation providing that cars predating the 1971 regulation "may continue in use" does not "cover the same subject matter" of, and does not substantially subsume the subject matter of, Plaintiffs' claims;

2) the mere general provision of the "may continue in use" regulation is not equivalent to an affirmative specific statement that such pre-1971 tank cars would be shielded from liability under state tort law which, according to the Ohio Court, is necessary to effect preemption;

3) although the regulation in question would likely preempt any state law or regulation on the subject, it is insufficient to preempt state common law claims under FRSA § 434?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

The parent companies of Petitioner Union Tank Car Company are: Marmon Holdings, Inc., GL Sub Co., Marmon Industrial Corporation. The non-wholly owned subsidiaries of Petitioner are: Marmon Holdings Corporation, VJ Equipment Limited, Rail Car Associates Limited Partnership.

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Petitioner Union Tank Car Company respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this cause.

OPINIONS BELOW

The opinion of the Ohio Supreme Court (No. 92-1244) is reported at 68 Ohio St.3d 255, 626 N.E.2d 85 (1994) and is reproduced in the appendix. The opinion of the Ohio Court of Appeals (No. CA-12590) is unpublished and is reproduced in the appendix.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on February 9, 1994. No Petition for Rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

45 U.S.C. § 434 provides:

§ 434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

(Pub.L. 91-458, Title II, § 205, Oct. 16, 1970, 84 Stat. 972.)

REGULATORY PROVISIONS INVOLVED

49 C.F.R. § 179.1 provides:

§ 179.1 General.

(a) This part prescribes the specifications for tanks that are to be mounted on or form part of a tank car and which are used for transportation of hazardous materials in commerce.

(b) Except as provided in paragraph (c) of this section, tanks to which this part is applicable, must be built to the specifications prescribed in this part.

(c) Tanks built to specifications predating those in this part may continue in use as provided in § 173.31 of this subchapter.

(d) Any person who performs a function prescribed in this part, shall perform that function in accordance with this part.

(e) When this part requires a tank to be marked with a DOT specification (for example, DOT-105A100W), compliance with that requirement is the responsibility of the tank builder. Marking the tank with the DOT specification shall be understood to certify compliance by the builder that the functions performed by the builder, as prescribed in this part, have been performed in compliance with this part.

(f) The tank builder should inform each person to whom that tank is transferred of any specification.

[Amdt. 179-17,41 FR 38183, Sept. 9, 1976]

§ 179.200-19 Reinforcements, when used, and appurtenances not otherwise specified.

(a) All attachments to tank and dome shall be applied by approved means. Rivets if used shall be caulked inside and outside.

(b) Reinforcing pads must be used between external brackets and shells if the attachment welds exceed 6 lineal inches of ¼ inch fillet or equivalent weld per bracket or bracket leg. When reinforcing pads are used, they must not be less than ¼ inch in thickness, have each corner rounded to 1 inch minimum radius, and be attached to the tank by continuous fillet welds except for venting provisions. The ultimate shear strength of the bracket to reinforcing pad weld must not exceed 85% of the ultimate shear strength of the reinforcing pad to tank weld.

[29 FR 18995, Dec. 29, 1964. Redesignated at 32 FR 5606, Apr. 5, 1967, and amended by Amdt. 179-10, 36 FR 21351, Nov. 6, 1971]

STATEMENT OF THE CASE

On July 8, 1986, a train derailed in Miamisburg, Ohio. One railroad car involved was UTLX 79499, a tank car manufactured and owned by Union Tank Car Company (hereinafter "UTC"). The tank car was being used to transport yellow phosphorous, a hazardous material.

The tank car (UTLX 79499) was ruptured in the derailment, and phosphorous escaped and ignited upon exposure to the air, creating a dangerous phosphorous cloud. One of the ruptures was a six-inch hole in the bottom of the tank shell at the brake support attachment, where the brake attachment had separated from the tank shell. Local

public safety officials ordered mass evacuations of the surrounding area due to the potentially toxic effects of the phosphorous cloud.

Plaintiffs are various individuals who were allegedly injured as a result of the derailment. The trial court certified a group as a class and certified the issues of negligence, qualified nuisance, and punitive damages for trial.

Plaintiffs claimed in essence that phosphorous escaped because UTLX 79499 was not equipped with a reinforcing pad where the brake attachment connected to the shell of the tank car. Plaintiffs alleged that such a pad would have reduced the possibility of a rupture to the car during a derailment.

In 1971, federal regulations pertaining to the transportation of hazardous materials were amended. The regulations required all new railroad tank cars engaged in the transportation of hazardous materials to be equipped with reinforcing pads where any attachments (including brakes) met the shell of the tank car. 49 C.F.R. § 179.200-19(b). A separate regulation allowed tank cars manufactured prior to the 1971 adoption of this regulatory mandate to continue in use. 49 C.F.R. § 179.1(c). UTLX 79499, manufactured in 1966, was thus allowed to remain in use without complying with the reinforcing pad regulatory requirement.

Prior to trial UTC moved for summary judgment, arguing that plaintiffs' common-law tort claims were preempted by the federal regulations governing tank car specifications. The trial court in effect overruled both motions, finding that alleged compliance with federal regulations did not preempt plaintiffs' claims. At the close of plaintiffs' evidence, however, the court granted UTC's motion for directed verdicts. The trial court found it sig-

nificant that plaintiffs' experts acknowledged that UTC had met all the applicable United States Department of Transportation ("DOT") regulations in effect for the transportation of hazardous materials, and held that UTC had no regulatory duty to retrofit UTLX 79499 with reinforcing pads.

Disposition Below

After a trial wherein the evidence showed that UTC had met all Department of Transportation regulations in effect for the transportation of hazardous materials, the trial court noted that railroad tank car design and manufacture was a specialized and heavily regulated industry. It ruled that UTC had met all the applicable DOT regulations and had no statutory or regulatory obligation to retrofit UTLX 79499 with a reinforcing brake pad. The Court further held that UTC had not been shown to have engaged in conduct falling below industry or other applicable standards, which would constitute negligent behavior. The trial court therefore directed a verdict in favor of UTC.

The Court of Appeals unanimously affirmed the judgment of the trial court. It held that Congress, through a chain of delegation, has evinced its intent to cover the subject matter of tank car specifications and has concluded that retrofitting brake attachments is unnecessary. The Court of Appeals held that accordingly, the common law tort claim duties advanced against UTC were preempted by the preemption provision of the FRSA. The Court of Appeals affirmed the trial court judgment.

The Supreme Court of Ohio in a majority opinion reversed the Court of Appeals. The majority held that although it is likely that the regulation would have pre-

empted any effort by the state of Ohio to enact a state law or adopt a state regulation which required reinforcing pads on tank cars built before 1971, it does not preempt common law tort claims of failure to retrofit. (App. A17). The Supreme Court held that reliance upon the mere statement that UTLX 79499 could "continue in use" is insufficient to insulate UTC from tort liability. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case for trial on the tort claims.

The dissenting opinion of two justices found this holding to be in conflict with this Court's recent decision in *CSX Transp. Corp. v. Easterwood* (1993), 507 U.S. ____, 113 S.Ct. 1732, 123 L.Ed.2d 387. The dissent stated that a review of the applicable federal statutory and regulatory provisions leads to the conclusion that Plaintiffs' claims are preempted by the FRSA and that the judgment of the Court of Appeals should be affirmed. The dissent held that there was no necessity that the assertedly preemptive provision in question be equivalent to a statement that UTC is shielded from tort law. The dissent also found that the regulation "substantially subsumes" Plaintiffs' tort claims. The dissent also rejected the majority's distinction between state regulation and common law tort claims. The dissent would have affirmed the Court of Appeals.

Petitioner UTC now seeks review of this judgment by this Court.

REASONS FOR GRANTING THE PETITION

The decision of the Ohio Supreme Court in the case at bar has frustrated the Congressional purpose and rejected this Court's decision in *CSX Transp. Co. v. Easterwood* (1993), 507 U.S. ____, 113 S.Ct. 1732, 123 L.Ed.2d 387. The decision arbitrarily subjects the defendant to state common law tort claims even though Defendant is in full compliance with all applicable federal rules and regulations. (App. B3). The compliance with all federal regulations was established at trial and even Plaintiffs' experts acknowledged that Defendant had met all of the applicable United States Department of Transportation regulations in effect for the transportation of hazardous materials. (App. A2).

Defendant is now under this case subjected to liability under Ohio common law tort theories that would seek to impose liability despite the express approval of the Secretary of Transportation of the continuation in use of tank cars manufactured prior to 1971 (such as UTLX 79499 in the case at bar) without the reinforcing pads required by the new regulations.

This result will have a crippling effect on the effective operation of the rail industry and is obviously contrary to the purposes of the FRSA. Defendant will be arbitrarily subject to tort claims in various states for conduct that has been expressly approved on a federal level by persons with expertise, but may be found by a solitary jury of laymen in the State of Ohio to be negligent or otherwise tortious. This Court should not allow this result to stand.

I.

THE SUPREME COURT OF OHIO HAS ERRONEOUSLY INTERPRETED THE "SUBSTANTIALLY SUBSUMES" STANDARD ESTABLISHED BY THIS COURT.

The Ohio Supreme Court noted in its opinion that the Secretary of Transportation's regulation requiring that non-pressure tank cars which haul hazardous materials must have reinforcing pads between external attachments and the shell of the car (49 C.F.R. § 179.200-19(b)) would cover the subject matter of and therefore preempt any claim regarding the sufficiency of the reinforcing pads of a tank car manufactured after 1971. (App. A15-16). This conclusion was based upon a discussion of this Court's holding in *CSX Transp. Corp. v. Easterwood* (1993), 507 U.S. ____, 113 S.Ct. 1732, 123 L.Ed.2d 387 and pursuant to an analysis purportedly similar to that used in *Easterwood*. (App. A15-16). The regulation places a duty on tank car manufacturers to use the reinforcing pads, and sets out the specifications that must be followed when the pads are welded in place between the attachment brackets and the tank car shells.

The tank car in question was manufactured in 1966 and so the provision mentioned above does not apply to it. Instead the provision of 49 C.F.R. § 179.1(c) that tanks mounted on or forming part of a tank car built to specifications predating those in this part may continue in use plainly applies to this tank car. Yet the Ohio Supreme Court inconsistently and erroneously held that the provision requiring the pads on cars built after 1971 is preemptive while the provision exempting preexisting tank cars is not.

The stark and irreconcilable defect in the Ohio Supreme Court opinion is in holding that the first provision does

"cover the subject matter of" the Plaintiffs' claim and does "substantially subsume" the subject matter while simultaneously holding that the exception, on the very same subject of brake pads on tank cars, does not "cover the subject matter" or "substantially subsume" the subject of Plaintiffs' claims regarding the necessity of brake pads on tank cars.

The Ohio Court of Appeals correctly held that Congress intended to preclude regulatory supplementations by the states in the area of rail safety and that all of the tort claims were preempted. (App. B4-5).

The dissenting opinion correctly stated that 49 C.F.R. § 179.1(c) authorizing UTC's continued use of UTLX 79499 without a reinforcement pad retrofit "substantially subsumes" plaintiffs' tort claims alleging failure to retrofit that tank with a reinforcing pad. The dissent noted that there is no distinction between the maximum speed regulation discussed in *Easterwood* and the regulation in this case authorizing the continued use of the subject tank without retrofitting with reinforcement pads in terms of covering the subject matter of whether defendant owed any additional common law duty. (App. A30).

This Court should grant this request for review to conform this decision to that rendered by this Court in *Easterwood* and to correct the plainly erroneous interpretation of the "substantially subsumes" doctrine which will have a serious deleterious effect on interstate commerce.

II.

THE SUPREME COURT OF OHIO HAS IMPOSED AN "EQUIVALENCY TEST" THAT IS NOT SUPPORTED BY ANY DECISIONS OF THIS COURT AND WILL ADVERSELY AFFECT THE DEVELOPMENT OF THE LAW ON THIS SUBJECT.

The Supreme Court of Ohio has held that there is a necessity of "equivalence" in that the preemptive regulation must be equivalent to a statement that there is no common law duty. (App. A16). The Court held that the mere general provision of 49 C.F.R. § 179.1(c) that tanks mounted on or forming part of the tank car "built to specifications predating those in this part may continue in use" is not equivalent to an affirmative specific statement that the owner or operator of a tank car built prior to 1971 is under no duty to retrofit with reinforcing pads; and is also not equivalent to the further specific statement that one who does not retrofit a pre-1971 built tank car with reinforcing pads is shielded from liability under state tort law. The Court concluded that because of this lack of specificity, the regulation does not "substantially subsume" the subject matter of Plaintiffs' tort claims. (App. A17).

This purported "equivalence test" is non-existent in the Court of Appeals opinion. This is properly so, because as the dissent in the Ohio Supreme Court noted, there is no such test. The dissent correctly noted that if such a test had been used by this Court in *Easterwood*, the result would have been that the plaintiff's excessive speed claim would not have been preempted by the federal regulations. Thus, in *Easterwood*, this Court would have found that the "mere general provision" establishing maximum speed limits for different classes of track was not "equivalent to an affirmative specific statement" that a

railroad is shielded from liability under state tort law if it fails to reduce the train's speed when approaching a grade crossing where the train's speed is already below the maximum permitted by 49 C.F.R. § 213.9(a).

The dissent points out that if the Court in *Easterwood* had employed the majority's rationale in this case, there would have been a finding of no preemption, as the two statements are not equivalent. In fact, however, this Court found preemption in *Easterwood* without any finding of equivalence.

It may further be stated that many regulations that have been found to be preemptive in various fields would not pass such an "equivalence" test. It is a rare or non-existent regulation that expressly and specifically states such matters as that a regulated potential defendant is "shielded from liability under state tort law."

This Court should review this decision and clarify the law on this point for the benefit of all regulated industries and potential plaintiffs.

III.

THE SUPREME COURT OF OHIO HAS IMPERMISSIBLY DRAWN AN ARTIFICIAL DISTINCTION BETWEEN STATE REGULATION AND COMMON LAW TORT CLAIMS FOR FRSA § 434 PREEMPTION PURPOSES.

The plainest departure in this case from existing law is the explicit statement in the opinion of the Supreme Court of Ohio that it draws a distinction between state regulation and common law claims for FRSA § 434 preemption purposes. (App. A17). There is no support for such a distinction in the law. The Court of Appeals of Ohio made no such distinction. The dissent properly notes the error in this holding.

Oddly, the Supreme Court of Ohio granted that it was likely that this regulation in question would preempt any effort by the state of Ohio to enact a state law or adopt a state regulation which required reinforcing pads on tank cars, such as UTLX 79499, built before 1971. (App. A17). The Court then held, however, that it makes a distinction between common law tort claims and state regulations in this circumstance. (App. A17). The Court concluded that the regulation does not preempt state common-law tort claims. (App. A17). The result of this distinction is a heretofore unknown bifurcation of state law within the preemptive reach of FRSA § 434.

The dissenting opinion rightly observes that this distinction between state regulation and common law tort claims has been specifically rejected by this Court in *Easterwood*. (App. A29-30).

This Court should review this case to correct this misinterpretation of the law.

CONCLUSION

As noted above, 6 of the 11 Ohio judges who have considered this case have agreed that there should be preemption (i.e., trial judge, 3 Court of Appeals judges, 2 Supreme Court judges). Only 5 judges thought there should be no preemption and this is unfortunately the result reached in a plainly erroneous opinion in this cause. This Court should grant this Petition to correct this misinterpretation of the law of preemption which will have

a strong impact across the nation if not reviewed and reversed by this Court.

Respectfully submitted,

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